ELAINE D. BERMAN
JOHN M. BEARD

IBLA 94-582, 94-705 Decided August 29, 1997

Appeals from decisions of the Montana State Office, Bureau of Land Management, denying rental refunds for oil and gas leases. MTM 54937, MTM 54939.

Reversed.

1. Accounts: Refunds--Oil and Gas Leases: Rentals--Payments: Refunds

A decision denying a rental refund for an oil and gas lease may be reversed when it appears that a lease has been issued as a consequence of a mistake of law or fact not attributable to the lessee, the evidence on appeal discloses that the lessee did not derive any benefit from possession of the lease during the time he held it, and there is no indication of mala fides or other factors militating against a refund.

APPEARANCES: Timothy C. Fox, Esq., Billings, Montana, for Appellants; Natalie Eades, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Elaine D. Berman has appealed a May 19, 1994, letter of the Acting Deputy State Director, Montana, Bureau of Land Management (BLM or the Bureau) denying her request for refund of $32,045 in rental payments for oil and gas lease MTM 54937. Berman appealed that determination and the case was docketed as IBLA 94-582. John M. Beard has similarly appealed from a May 19, 1994, letter from the Acting Deputy State Director, Montana, announcing that BLM would not refund rental paid for oil and gas lease MTM 54939. Beard's appeal was docketed as IBLA 94-705. The decisions gave the same reasons for denying the refunds, and BLM moved to consolidate the appeals because they arose from a related factual context and raised similar issues. By an Order dated August 31, 1994, the motion was granted.

Both leases were issued by BLM on August 24, 1982, with an effective date of September 1, 1982, to the applicants receiving priority in the March 1982 simultaneous oil and gas drawing. Berman signed lease MTM 54937 and its stipulations on August 3, 1982. Beard signed lease MTM 54939 on August 5, 1982. On August 24, 1982, BLM sent letters to both Berman and

Beard informing them that the decision to issue the leases was based on the environmental assessment and findings of no significant impact prepared by the U.S. Forest Service (FS) for oil and gas leasing in the Deep Creek/ Reservoir North RARE II Further Planning Area and warning them that the adequacy of these documents was under challenge in a lawsuit filed on February 10, 1982, Bob Marshall Alliance v. Watt, No. 82-15-GF (D. Mont.). The letters stated that issuance of the leases was "subject to the outcome of the lawsuit."

Both Berman and Beard paid the first year's lease rental and continued paying rental thereafter until BLM suspended the leases on October 14, 1986, effective May 1, 1986. Beard had requested a suspension of operation and production of lease MTM 54939 on September 11, 1985, asserting the lease was useless for oil and gas exploration until the litigation was completed, but BLM denied the request on August 9, 1985, stating the lease was not directly affected by the litigation. The leases were suspended by BLM after the issuance on May 27, 1986, of a Memorandum and Order by the district court in the Bob Marshall Alliance litigation, setting aside actions by BLM and the FS which allowed the issuance of the leases. 685 F. Supp. 1514 (D. Mont. 1986). The suspensions were to remain in effect until resolution of the litigation regarding the leases.

The district court's decision was appealed to the Ninth Circuit Court of Appeals which affirmed in part, reversed in part, and remanded the case to the district court for a clarification of its Order and to determine the specific steps to be taken with respect to the various Deep Creek leases. Bob Marshall Alliance v. Hodel, 852 F.2d 1223 (9th Cir. 1988). In a Memorandum and Order issued on remand on July 10, 1992, the district court determined that the only appropriate remedy for the procedural violations of section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536 (1994), section 102 of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332 (1994), and the agencies' regulations was the cancellation of the Deep Creek leases, including those leases held by Berman and Beard. Bob Marshall Alliance v. Lujan, 804 F. Supp. 1292 (D. Mont. 1992). The Order of the court also denied the motion of intervenor Paul C. Kohlman to amend his answer to seek a refund of lease rental payments. Kohlman appealed that decision but subsequently withdrew the appeal when BLM agreed to settle his claims for $50,000. 1/

1/ Kohlman had paid $51,220 in rental on five leases. After his motion was opposed on the ground that jurisdiction over the refund claims was vested in the U.S. Claims Court, Kohlman amended his claim in the district court to limit his total claim to $50,000, seeking $10,000 per lease and waiving any recovery in excess of $10,000 per lease claim so as not to preclude the district court from exercising jurisdiction over his claim. Bob Marshall Alliance v. Lujan, supra. The court, however, denied the motion to file an Amended Answer to include the refund claim, noting "that Kohlman knowingly assumed the business risk of an injunction and, as a result, may not look to the government as his guarantor with respect to the rental payments." Id.

By letter dated June 30, 1993, Berman requested that BLM refund the $32,045 in rental that she had paid for lease MTM 54937 stating that she had never held a valid lease and therefore as a matter of equity was entitled to a refund. After consulting with the Solicitor, BLM denied the refund request in a letter dated May 19, 1994, citing that part of the district court's decision cancelling the leases which denied the motion by Kohlman seeking to amend his pleading to include a claim for refund of his rental payments. 2/ It specifically noted the court's statement about Kohlman assuming the risk. Responding to an inquiry by Beard about the status of his lease, BLM sent him a similar letter stating that rental paid prior to the suspension would not be refunded. Beard appealed that letter.

Berman and Beard filed separate Statements of Reasons (SOR) but Beard adopted and incorporated all the legal arguments made in Berman's. After consolidation of the appeals and the filing of BLM's consolidated Answer, Berman and Beard filed a consolidated Reply.

In their SOR's, Berman and Beard argue that they are entitled to refunds because they meet the general test the Board has set out in earlier decisions. They cite Romola J. Jarett, 63 IBLA 228, 89 Interior Dec. 207 (1982), in which the Board concluded that a refund of rental was appropriate where rentals were paid for lands which were never really subject to oil and gas leasing and where the lessees derived no benefit from the lease. They assert that the lands in the Deep Creek area were never available for leasing because BLM and the FS had failed to comply with applicable environmental laws and regulations, and thus the leases were determined to be void ab initio by the district court. Therefore, they maintain that since no valid leases existed no rental payment could be required. Moreover, they contend that while they were required to continue paying rental in order to preserve any future rights to develop the leases, they gained no benefit from the leases because of the cloud on the title due to the litigation.

Berman and Beard also argue that BLM's refusal to refund their rental should be reversed because it was based on dicta in the district court Order in Bob Marshall Alliance to which neither of them was a party. Berman and Beard assert that the court ruling denying the motion to amend Kohlman's claim was not a ruling on the merits and was contrary to the established precedent of the Board upholding the right of a lessee to receive a refund when the underlying lease is cancelled. They contend that the Board is not bound by such dicta. They also point out that Kohlman's claim for a refund was not extinguished by the court's decision, noting

2/ By letter dated June 17, 1994, BLM informed Berman that it had reviewed the record and concluded that excess rentals in the amount of $8,545.32 were paid during the period that the lease was suspended and that sum was being refunded to Berman, leaving $23,499.68 in rental in dispute.

that after he appealed the decision to the Ninth Circuit Court of Appeals his claim was settled for the amount of $50,000, which was what he had sought.

In its answer, BLM agrees that the Secretary has the authority to refund the rental but maintains that the question of whether a refund should be granted has been left to the discretion of the Secretary. It notes that the Board has held a refund was authorized "where a lease must be canceled as having been issued under a mistake of law or fact not due to any fault of the lessee," Beard Oil Co., 1 IBLA 42, 47, 77 Interior Dec. 166, 169 (1970), and that refunds should be made where "lease rentals were paid for lands which were never really subject to oil and gas leasing and where the lessee derived no benefit from the lease." Romola J. Jarett, supra. However, BLM also points out that in Warren L. Jacobs, 71 IBLA 385 (1983), the Board emphasized that each refund request should be examined to determine whether any factors militate against refund, including whether the lessee derived any benefit from possession of the lease or held it for any length of time with knowledge that it was improperly issued.

The Bureau asserts that no rental refund is appropriate for these leases because the lands were available for leasing and also because both lessees gained a benefit from the leases. It claims that the lands were available for oil and gas leasing, thus distinguishing this situation from the cases cited by Berman and Beard where the lands were never legally available. It notes that in Bruce Anderson, 30 IBLA 118 (1977), the lands had been incorporated in the city of El Reno prior to leasing and thus were not legally available to be leased. Here, BLM argues, the lands were available for leasing and were cancelled only for failure to comply with requirements of NEPA, ESA, and agency regulations. Moreover, BLM maintains it had the authority to lease the lands at the time it issued the leases and once BLM and FS have complied with NEPA and the ESA, assuming no withdrawals have been imposed, the lands could be leased again.

The Bureau also contends that both Berman and Beard benefitted from the leases they held. In support of this contention BLM relies on a decision by this Board in Paul C. Kohlman, 111 IBLA 107 (1989), which upheld a BLM denial of an application for a suspension of leases involved in the Bob Marshall Alliance litigation. While recognizing that the standard for granting a suspension of a lease is different from that for granting a refund, BLM claims that it is pertinent because the Board found that while the litigation may have clouded the title on the leases it did not by itself effect a denial of the beneficial use of the leases. In addition, BLM argues that Berman gained a benefit from a February 12, 1985, agreement with Conoco, Inc., whereby Conoco agreed to purchase her lease for $192,270. The agreement was amended on April 3, 1985, after Conoco learned of the litigation, but provided it would remain in effect until March 1, 1988. One of the terms of the amended agreement was that "Conoco shall pay or reimburse Berman for all rentals required under the terms of the lease."

In further support of its assertion that Berman benefitted from the lease, BLM points to the assignment by Berman of a 15-percent interest

in lease MTM 54937 to Robert G. Volkman. The assignment was approved by BLM on July 24, 1989, effective October 1, 1989. The Bureau admits there is nothing in the record showing that Berman received any consideration from Volkman for the 15-percent interest, but suggests the possibility. The Bureau maintains that Berman's agreement with Conoco and the partial assignment to Volkman, show Berman gained a benefit from the lease despite the litigation.

While the record for lease MTM 54939 gives no indication that Beard attempted to develop his lease or assign any portion of it, BLM insists that, like Berman, he had the beneficial use of the lease from lease issuance in 1982 to the time the court ordered cancellation in 1992. While BLM does not attempt to show any particular benefit he received from the lease, it maintains that because Beard retained his right to the beneficial use of the lease during that time, he cannot be said to have not derived some benefit from the lease.

The Bureau also argues that both Berman and Beard were notified of the litigation when BLM issued the leases and chose to pay the rental and maintain the leases despite that knowledge. While BLM concedes that the district court's statement as to Kohlman assuming the business risk is dicta, BLM contends that the principle is a sound one and not contrary to the Board's findings in other cases dealing with rental refunds. Moreover, BLM asserts that the court's statement is in keeping with the Board's decision in Warren L. Jacobs, supra, wherein this Board concluded the lessee was not entitled to a refund because the lessee had "enjoyed the lease for five years and might, inasmuch as the notice of the deficiency was properly delivered, be deemed to have constructive knowledge of the deficiency." Id. at 388.

In their reply, Berman and Beard reject BLM's assertion that the lands were available for leasing because it had the authority to lease the lands and only needed to comply with NEPA, ESA, and agency regulations in order to lease them. Berman and Beard contend that the entire crux of the Bob Marshall Alliance litigation is that the BLM and FS had failed to comply with NEPA, ESA, and their regulations, thereby making issuance of the leases an illegal act and the leases void. They cite Beard Oil Co., supra, to support their argument that because BLM had no authority to execute the leases it had no authority to exact rental payments. Moreover, Berman and Beard assert that no land can be considered available for leasing without prior compliance with all applicable law because, as defined in Webster's New Collegiate Dictionary (1974), the word available means "present or ready for immediate use." Thus, until BLM complied with NEPA and ESA as well as the regulations, the lands were not available for leasing, because they were not ready for immediate use. Since the lands were not available for leasing the rentals should be refunded.

Berman and Beard also argue that even if the lands were to be considered to have been available for leasing they are still entitled to refunds under prior Board decisions. They note previous Board decisions in which

rentals were refunded even when the lands had been available for leasing. Arden R. Grover, 73 IBLA 308 (1983) (failure of lessee to pay rental deficiency); Albert J. Finer, 27 IBLA 61 (1976) (lessee failed to pay full first year rental); Charles J. Babington, 17 IBLA 435 (1974) (lease issued to unqualified applicant); J.V. McGowen, 9 IBLA 133 (1973) (lessee failed to file statement of interest); Beard Oil Co., supra (lease issued to wrong applicant). They assert that the Board must examine the circumstances of each refund request and determine each on its own merits and argue that under the circumstances presented in their appeals they are entitled to refunds.

Berman and Beard assert that the facts show that neither of them received any benefit from ownership of the leases. In an affidavit filed with her SOR, Berman states that she has derived no benefit from possession of the lease. (SOR Ex. C, Reply Ex. A.) An affidavit has also been submitted from Volkman stating that he did not give any consideration or benefit to Berman or anyone else for the assignment of lease MTM 54937. (Reply Ex. D.) There is also an affidavit from Robert E. Prime, Executive Assistant for John Beard, stating that Beard had derived no benefit from ownership of his lease. (Reply Ex. B.) In addition, Berman argues that Conoco specifically terminated the agreement to purchase her lease due to the cloud on the lease title. Berman has also submitted a letter from Conoco stating that BLM refused to approve a lease assignment until all actions were final in the litigation and asserts this proves that BLM precluded development of her lease by advising potential bonded oil and gas operators that no development would be allowed pending the outcome of the litigation.

In response to BLM's contention that they assumed the risk by continuing to pay rental, Berman and Beard argue that they should not have to suffer the loss of their rental payments because the agencies failed to cancel the leases until the court ordered it or failed to comply with the law and regulations in the first place. They note that in previous decisions the Board has approved rental refunds even when the lessee held the lease for several years and presumably could have developed the lease. Berman and Beard argue that they did not know that the leases were improperly issued until the final court Order of July 10, 1992, cancelling the leases and point out that until that date, BLM was arguing in court that the leases were issued properly. Thus, they contend that BLM cannot now argue that they should have known that the leases were issued improperly at a time when BLM was arguing they were proper. They also assert that it was BLM that violated the law when it issued the leases, as proven by the court ordered cancellation.

Appellants distinguish their situation from that of the appellant in the Board's decision in Paul C. Kohlman, supra. They note that the decision was issued prior to the court ordered cancellation of the leases and also that Kohlman had failed to present evidence to the Board that he was precluded from developing his lease, whereas they claim they have presented evidence that shows BLM's actions and the Bob Marshall Alliance litigation created a cloud on their titles, thereby precluding development.

[1] Under section 304 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1734(c) (1994), the Secretary has the authority to refund rental payments but the question of whether a refund should be made is subject to the discretion of the Secretary. This discretionary authority was formerly exercised under the authority of section 204(a) of the Public Land Administration Act, 43 U.S.C. § 1374 (1970). Effective October 21, 1976, section 204(a) of the Public Land Administration Act was repealed by section 705(a) of FLPMA, Pub. L. No. 94-579, 90 Stat. 2792-93. However, the language of section 304(c) of FLPMA, 43 U.S.C. § 1734(c) (1994), is similar in all material respects to the language of former section 204(a). 3/

This Board has long held that it is appropriate to refund lease rentals where the lease should never have been issued, there is no evidence lessees derived any benefit from possession of the lease during the time they held it, and no indication of mala fides or other factors militating against repayment. See Arden R. Grover, supra. Thus, in previous cases, the Board has observed that the circumstances of each lease should be examined to ascertain whether rental should be refunded. Emery Energy, Inc., 90 IBLA 70 (1985); J.V. McGowen, supra. The rule that has been applied in determining whether a refund of rentals is proper in cases such as this was set forth as follows in J.V. McGowen, supra, at 138:

> This Board, while holding that a refund of rentals could be made where a lease was issued to other than the first qualified applicant as a result of a mistake of law or fact not attributable to the lessee, warned that a refund might not be made if the cancellation of the lease is due to some fault of the lessee himself [4/] or if he stands to benefit through any arrangement

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3/ Following is the text of 43 U.S.C. § 1734(c) (1994):

"In any case where it shall appear to the satisfaction of the Secretary that any person has made a payment under any statute relating to the sale, lease, use, or other disposition of public lands which is not required or is in excess of the amount required by applicable law and the regulations issued by the Secretary, the Secretary, upon application or otherwise, may cause a refund to be made from applicable funds."

4/ One of the factors militating against refund of rentals is knowledge that a lease was improperly issued. Warren L. Jacobs, supra; Bruce Anderson, supra; Charles J. Babington, supra. As BLM points out, Berman and Beard were aware of the litigation and chose to continue to pay rental in order to maintain the leases. However, knowledge of a challenge to a lease is not knowledge of a legal deficiency in the lease. It is simply knowledge that others believe there is a deficiency in the lease. At the same time, BLM was denying the existence of any deficiency and defending its actions in issuing the leases before the district court and the Ninth Circuit Court of Appeals. We cannot conclude the lessees should be held to have knowledge of a deficiency that BLM denied existed. Thus, it cannot be said that Berman and Beard held the leases knowing that they were improperly issued. Until the final Memorandum and Order of the district court on July 10, 1992, ordering the cancellation of the leases no one could be said to have known that the leases were improperly issued.

> with parties seeking the cancellation of the lease. Beard Oil Company, [supra at 47, 77 Interior Dec. at 169].

Application of these factors to the case at issue supports a refund of the lease rentals. Although the lands at issue were subject to oil and gas leasing at the time the leases issued in the sense that the relevant statutes authorized leasing of such lands, unlike cases such as Romola A. Jarett, supra, in which the land at issue was patented and thus not subject to leasing, we find this distinction to be insignificant in the context of this case. The fact that the land was subject to leasing if the proper legal requirements were fulfilled is not dispositive as the court rulings in the Bob Marshall Alliance litigation clearly found that the leases were improperly issued by BLM in violation of law and, hence, cancelled the leases. 5/ Thus, the leases issued due to a mistake of law on the part of BLM which could not be attributed to the lessees. In such circumstances, a refund is proper in the absence of evidence that the lessees benefitted from issuance of the leases which were later cancelled.

It also appears from the record that Appellants did not derive any benefits from the leases issued to them in view of the ongoing litigation. While BLM points to the agreement between Berman and Conoco, it appears from the record as supplemented on appeal that this agreement was executory in nature and resulted in no benefit to Appellant because Conoco withdrew from the agreement as it became apparent that the litigation subjected the lease to cancellation. In addition, Berman has submitted an affidavit stating she has never received any benefit from the lease and an affidavit from Volkman that he never gave any consideration or benefit to Berman. Similarly, the record on appeal indicates that Beard received no benefit as a result of holding the lease prior to cancellation.

We find that the cases relied upon by BLM are either distinguishable or do not support a different result. The BLM seeks to rely on Charles J. Babington, supra, to support its argument that Berman and Beard had received a substantial portion of the rights granted by the

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5/ The district court in Bob Marshall Alliance v. Lujan, ordered the leases cancelled after concluding that cancellation was the only remedy which would "effectively foster NEPA's mandate requiring informed and meaningful consideration of alternatives to leasing the Deep Creek area, including the no-leasing option." 804 F. Supp. at 1297. The district court noted that the Ninth Circuit had determined that NEPA requires that alternatives, including the no-leasing option, be given full and meaningful consideration but that "by definition, the no-leasing option is no longer viable once the leases have been issued; it must be considered before any action is taken or the statutory mandate becomes ineffective." 804 F. Supp. at 1297 n.7. Because the no-leasing option was not considered prior to lease issuance, the district court held cancellation was necessary in order to insure that the no-leasing option be studied on a clean slate to fulfill the statutory mandate. Thus, the district court concluded that until the requirements of the statute had been fulfilled there could be no leasing.

leases and therefore were not entitled to a refund. The Babington case is distinguishable, however, in several respects: the leases involved were cancelled because the lessee failed to comply with the regulations governing issuance of oil and gas leases; one lease for which a refund was denied was not cancelled in part because of a partial assignment to a bona fide purchaser; and a refund was denied for one lease because it was held with the knowledge that lessee's interest in related leases had been held invalid. Finally, we note that a refund was granted for one of the cancelled leases in Babington where there was no evidence that any disposition of the lease was accomplished. 17 IBLA at 440.

Further, we think the case of Paul C. Kohlman, supra, is distinguishable. In that case which also involved leases affected by the Bob Marshall Alliance litigation, an appeal was taken from a decision of BLM denying a request for refund of lease rental and a retroactive suspension of Kohlman's leases from the date of issuance to the date of the May 1986 district court Order setting aside the actions of BLM and FS which resulted in lease issuance. That Board decision was issued in the context of the ongoing litigation and, specifically, prior to the district court Order cancelling the leases involved on the ground they were issued in violation of requirements of NEPA and ESA.

Under FLPMA section 304(c), the circumstances of this case would permit refund of the rental paid. See Albert J. Finer, supra. The land was not available for leasing at the time the leases were issued, because BLM and FS had not complied with the statutory mandates. There is no evidence that Berman or Beard derived any benefit from possession of the lease during the time they held the leases, nor is there any indication of mala fides or other factors militating against repayment. Cancellation of the leases was not due to any mistake of law or fact attributable to the lessees. Applying the standard of discretion enunciated in cases under section 204(a) and FLPMA section 304(c), we conclude that Appellants should be granted a refund of their rental payments. See Emery Energy, Inc., supra; Bruce Anderson, supra; Charles J. Babington, supra.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decisions appealed from are reversed, and the cases are remanded to BLM for refund of rental payments.

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C. Randall Grant, Jr.
Administrative Judge

I concur:

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James L. Byrnes
Chief Administrative Judge